Exhibit B

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[ADDITIONAL PARTIES AND COUNSEL SHOWN ON SIGNATURE PAGE]

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and California Electricity Oversight Board,

Plaintiffs,

v.

Arizona Electric Power Cooperative, Inc.; City of Anaheim; City of Azusa; City of Banning; City of Burbank; City of Glendale; City of Los Angeles; City of Pasadena; City of Riverside; City of Santa Clara; City of Seattle; City of Vernon; Los Angeles Department of Water and Power; Modesto Irrigation District; Northern California Power Agency; Public Utility District No. 2 of Grant County; Sacramento Municipal Utility District; and Turlock Irrigation District,

Defendants.

Case No.: BC 369141

Included action within Judicial Council Coordination Proceeding No. 4512 (Electric Refund Cases)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' DEMURRERS, VOLUME 2 OF 2 (DETAILED ARGUMENT)

Complaint Filed: April 9, 2007

Judge: Hon. Wendell Mortimer, Jr.
Hearing: November 30, 2007
Time: 9:00 a.m.
Department: 307

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a public entity's contractual obligations." *L.A. Equestrian Ctr. Inc. v. City of Los Angeles*, 17 Cal. App. 4th 432, 449 (1993) (citation omitted).

Consistent with this limitation, *all* of the cases cited by Defendants involved a plaintiff who provided goods or services to a government entity *without properly forming an express contract with that government entity*, and then sought recovery from the governmental entity for the value of the goods or services provided. *See Lundeen Coatings Corp.*, 232 Cal. App. 3d 816 (plaintiff seeking compensation for construction work); *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089 (2004) (plaintiff seeking compensation for improvements to public property); *Miller v. McKinnon*, 20 Cal. 2d 83 (1942) (plaintiff suing on behalf of county to recover money spent by county on services); *North Bay Constr., Inc. v. Petaluma*, 143 Cal. App. 4th 552, 563 (2006) (plaintiff seeking compensation for work performed on city land). Each of these cases affirms the strong public policy rationale to protect public funds from "waste and dissipation" that might occur as a result of "fraud, corruption and carelessness" if parties were permitted to foist unwanted or improper contracts on governmental agencies, and courts scrupulously enforce compliance with such requirements. *See, e.g., Miller*, 20 Cal. 2d at 88.

None of those cases has any application to the facts here. Since Defendants were voluntary *sellers*, not buyers, who entered into express contracts to sell power into the ISO and PX markets, there is no corresponding reason to protect them from "fraud, corruption, and carelessness" or worry about "waste and dissipation," and none of the foregoing policy arguments are implicated. Accordingly, the "general rule" does not apply at all, and under these facts, *Utility Audit* establishes that the IOUs' claims for unjust enrichment and money had and received are not barred.[79] 112 Cal. App. 4th at 958.

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[79] As against PG&E, there is yet another reason why Defendants' assertion of sovereign immunity is flawed: by filing claims against PG&E in its bankruptcy, Defendants have waived their sovereign immunity defenses. 11 U.S.C. § 106(b); *Ocean Servs. Corp. v. Ventura Port Dist.*, 15 Cal. App. 4th 1762, 1779 (1993). Under the bankruptcy code, any government entity that files a proof of claim in bankruptcy waives sovereign immunity as to any claims the bankrupt entity has against it to the extent the parties' claims against each other arise out of the same transaction or occurrence. *Id.* Here, each Defendant filed proofs of claim in the PG&E bankruptcy concerning

(Footnote Continued)

B. The IOUs' Claims for Unjust Enrichment and Money Had and Received Can Proceed Regardless of the Outcome of Their Contract Claims.

Similarly, there is no merit to Defendants' contention that the California Parties' claims for unjust enrichment and money had and received are barred because the parties' rights are otherwise defined by an express contract. JD Br. at 49-50. These rules apply only when the unjust enrichment claim is *inconsistent with an express contract between the parties*, and here there is no inconsistency. *Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1387 (1999) ("There cannot be a valid express contract and an implied contract, each embracing the same subject, but compelling different results."). The rule simply reflects courts' unwillingness to rewrite the express terms of the parties' bargained-for exchange: "'[W]here the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability . . . .'" *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal. App. 4th 1410, 1419 (1996) (quoting *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 613 (1975)). But it does not apply where, as in this case, "there is no readily ascertainable conflict between [the] implied contract theory and the express terms" of a written agreement. *Hillsman v. Sutter Cmty. Hosps. of Sacramento*, 153 Cal. App. 3d 743, 755 (1984).[80]

Here, the relevant contract does *not* preclude the remedy that the IOUs are seeking by their unjust enrichment and money had and received claims. Indeed, it is the very same remedy they are seeking on their breach of contract claims—refunds for amounts charged in excess of the MMCP. Thus, the unjust enrichment and money had and received claims do not require inconsistent interpretations with the contract claims nor do they "compel[] different results." Accordingly, the

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PG&E's failure to pay for purchases of electric energy. *See* Compendium of Defendants' Proofs of Claim Filed in PG&E Bankruptcy (RJN Exh. 25). In this case, PG&E, with the other IOUs, seeks refunds for these same transactions. Accordingly, Defendants have waived any sovereign immunity defense they may have had as to PG&E's claims against them for refunds.

[80] *California Medical Ass'n, Inc. v. Aetna U.S. Healthcare of California*, 94 Cal. App. 4th 151 (2001), a case relied upon by Defendants, is fully consistent with this rule. In *California Medical*, the court rejected plaintiff's quasi-contract claim because it sought relief *expressly prohibited* by the contract between the parties. *Id.* at 172-173.